IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI-GOA

CRIMINAL MISC. APPLICATION NO. 118 OF 2006

1. Shri V.V.P. Nair
   R/o. Swapna Vihar
   Ground floor, G-5, Vaddem,
   Vasco-da-Gama. .... Applicant

Versus

1. Shri Tilak B. Thapa
   Ptoprietor of Thapa Enterprises
   R/o. Susheela Bhawan,
   Mangor Hill,
   Vasco-da-Gama, Goa.

2. State of Goa,
   Through Public Prosecutor,
   Panaji-Goa. .... Respondents

Mr. E. Dias with Mr. Arjun F. Naik, Advocate for the Applicant.

Mr. R. G. Ramani, Advocate for Respondent No.1.

Ms. W. Coutinho, Public Prosecutor for Respondent No.2.

CORAM : **N. A. BRITTO, J.**
DATE : **04/05/2006**

ORAL ORDER

The Applicant herein is a complainant in Criminal Case No.134/N/2000/D. The said complainant succeeded in securing a

conviction against the accused under Section 138 of the Negotiable Instrument Act, 1881 before the trial Court but the accused having filed an appeal before the Court of Sessions, the learned Additional Sessions Judge was pleased to acquit the accused.

2. Against the said acquittal of the accused by the learned Additional Sessions Judge, the complainant has filed an application for leave to appeal and alongwith with it, has filed an application for condonation of delay of 168 days.

3. There is no dispute that the learned Additional Sessions Judge acquitted the accused by Judgment/Order dated 8/04/2005 but the complainant instead of immediately applying for a certified copy of the said Judgment chose to wait till 02/06/2005 and got the certified copy on 4/06/2005.

4. The complainant has stated that in first week of July, 2005 (now it stated that it was on 2/07/2005) the complainant had contacted the office of Advocate Shri E. Dias, his present lawyer with a request to file an appeal, as the complainant at that point of time was under bona fide

impression that the period of filing the appeal before this Court was 90 days and at that point of time the complainant left Goa to go to his native place in Kerala and in view of his absence the complainant constituted an attorney by name Ashok Shetye, resident of Porvorim, Goa to do the needful and the complainant left to his native place and prior to that he had shown to the said Attorney Shri Shetye the office of Advocate Shri E. Dias and handed over a copy of the power of attorney as well as the file pertaining to the case, as the appeal had to be filed immediately and that thereafter on 25/11/2005, the complainant came to the office of Advocate Dias and inquired about his case and upon contacting Advocate Shri Dias, the complainant was informed to meet Advocate Arjun Naik as to the knowledge of Advocate Shri E. Dias the appeal was filed and that Advocate Shri Arjun Naik immediately pointed out that the appeal memo alongwith the application for condonation of delay was ready but the attorney of the complainant had not turned up and he had no contact number of the complainant's said attorney known to Advocate Shri Arjun Naik and though the appeal was prepared in the month of July itself, it was not filed as the Attorney of the Applicant did not contact the office for filing of the appeal. The case of the complainant is that the complainant was under bona fide impression that the appeal was already filed and so also his Advocate Shri

E. Dias who was under bona fide belief that the said appeal was filed as from his side everything was ready and he did not realise that the Attorney had not turned up and further there was no contact number and address of the said Attorney available in the office to contact him and therefore the appeal could not be filed before this Court although it was ready.

5. The complainant has stated that the complainant had all intention and desire to pursue the matter and has been diligent in pursuing the matter but in view of the facts stated, there was delay occasioned. The complainant also stated that he was not involved in any litigation and did not know the legal intricacies in the matter nor knew the period of limitation but was under bona fide belief that the appeal had to be filed within 90 days.

6. The respondent/accused has contested the application. As per the accused, application for leave had to be filed within 60 days, computed from the date of order of acquittal and in the case at hand the complainant had to file application on or before 09/06/2005 and assuming that the complainant was under bona fide impression that the appeal had to be filed before 90 days than the appeal ought to have been filed atleast on or before

09/07/2005. The accused has also stated that the complainant was through out represented by Advocate and therefore the complainant could not have been under bona fide impression at any point of time that the period of filing the appeal was 90 days. The accused has also stated that even assuming that the complainant contacted Advocate Shri E. Dias in the first week of July, 05 with a request to file an appeal, than atleast in the second week of July, 05 the complainant must have surely come to know that the period of filing the appeal was 60 days and that the complainant ought to have filed the same on or before 09/06/2005 which period by the first week of July, 2005 when the complainant contacted Advocate Shri E. Dias had expired. The accused has stated that if the allegation of bona fide impression about the period to filing appeal was 90 days, the complainant would have immediately filed an appeal after contacting Advocate Shri E. Dias and would not have constituted an Attorney leaving the needful to be done by him and he would not have gone to the native place in Kerala or would not have waited up to 25/11/2005 to inquire in the office of Advocate Shri E. Dias about the matter.

7. Arguments have been heard from Shri Arjun Naik, the learned Counsel on behalf of the complainant and Shri R.G. Ramani, the learned

Counsel on behalf of the accused.

8. There can be no dispute that while condoning delay what matters is not the length of the period but the acceptability of the explanation offered to condone the delay. This has been stated by Apex Court in the case of ***N. Balkrishnan V*erus M.** ***Krishna Murthy*** wherein the Apex Court has stated that acceptability of the explanation for the delay is the sole criterion and the length of delay is not relevant and in the absence of anything showing malafide or deliberate delay is a direct tactic, the Court should normally condone the delay. The said observations were followed by this Court in the case of ***Sonerao Sadashivrao Patil and Anr. Versus Godawaribai Laxmansingh Gahirewar and Others*** **(AIR 1999 BOM 235)** by observing that the discretion given to the Court to condone delay and admit the appeal is to advance substantial justice. The Court also observed that in matters of condoning the delay the approach to be adopted is liberal and the phrase “sufficient cause” is adequately elastic to enable the Court to apply law in a meaningful manner. The Courts are required to adopt rational common sense approach and to take pragmatic approach while interpreting the concept of sufficient cause.

9. In ***Ram Nath Sao @ Ram Nath Sahu and Ors. Versus Gobardhan Sao and Ors.*** (AIR 02 SC 1201) the Supreme Court stated that there cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the Court should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal an exception more so when no negligence or inaction or want of bona fide can be imputed to the defaulting party. On the other hand, while considering the matter the Courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine like manner. However by taking a pedantic and hyper-technical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates either by default or inaction and defeating valuable right of such a party to have the decision on merit. This Court in the case of ***Laxman Versus State of Maahrashtra*** (1998(1) MHLJ 745) observed that the Court is required to exercise discretion in accordance with well

recognised principles and the discretion so exercised by the Court must proceed on material which spells out sufficient cause. The sufficient cause has to be considered with pragmatism and with justice oriented approach but "any cause" cannot be construed as "sufficient cause" and it is necessary for the Court to apply its mind to the cause shown to satisfy itself whether the cause so shown is sufficient or not.

10. There can be no doubt that the term "sufficient cause" has always been liberally construed, with a view to advance justice, for which Sections 5 of the Limitation Act, has been enacted. Courts are not overstrict in expecting such proof of suggested cause as it would accept for holding a certain fact established because the question does not relate to the merits of the dispute between the parties and if delay is condoned the merits of the dispute can be determined. However, this does not mean that the Court should readily accept whatever the party alleges to explain away his default. If the Courts accept anything and everything stated by a party, then such a party will have the last laugh at the cost of his adversary. The Court is certainly required to scrutinize the cause shown and would be justified in considering the merits of the evidence led to establish the cause. Elasticity

of the expression "sufficient cause" does not mean that it can be stretched to a breaking point. As stated by the Apex Court in the case of ***Ram Nath Sao @ Ram Nath Sahu (Supra)*** a balance has to be maintained. On one side the cause shown should not be rejected by finding faults in the facts stated to explain the delay. On the other hand, the Court is also required to take note of the fact that a valuable right is accrued to the other party which should not be lightly defeated. Here we have a case of the complainant who has involved his Attorney as well as his Advocate/s and both not coming to his aid by filing any affidavit in support of the facts stated by the complainant. Firstly it is pointed out, and in my view rightly, on behalf of the accused that the application itself has not been properly verified and if that is the case the facts stated by the complainant in the application cannot be accepted.

11. That apart, as rightly pointed out on behalf of the accused, the complainant has not mentioned as to the date of his departure to Kerala or the date of his return nor has produced any evidence to support that he had ever gone to Kerala. There is also no explanation as to why on 4/06/2005 after the complainant collected the certified copy of the Judgment of acquittal that the complainant could not himself approach his Advocate to

do the needful in the matter. Although the complainant has produced with this application the power of Attorney executed in favour of the said Shri Shetye, on the basis of the said power of Attorney itself, one cannot accept that the complainant had indeed given instructions to the said Attorney to file the appeal. As already observed there is no affidavit filed of the said Attorney to support what the complainant has stated in the application. The complainant has stated that the complainant had shown the office of Advocate Shri Dias to his Attorney the said Ashok Shetye but has not explained as to why the complainant himself could not go to his Advocate and do the needful so that Advocate Shri Dias could file necessary application. The conduct of the complainant from the very date the Judgment/order of acquittal was passed appears to be of inaction and negligence in not approaching his Advocate in time to file application for leave to appeal. One fails to understand as to how the complainant, who claims not to know legal intricacies could harbour a belief that appeal had to be filed within 90 days. The Complainant could have always asked his previous Advocate or Advocate Shri Dias about the time limit of filing the appeal. After all the Complainant knew that the appeal had to be filed immediately, as stated by him, but did nothing in that regard. The approach of the applicant in filing the application as has been most casual.

Considering the facts stated in the application, which are otherwise not supported by a properly verified affidavit, cannot be accepted. The application therefore is hereby dismissed.

N. A. BRITTO, J.

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